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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a live-in housekeeper. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary had the requisite experience as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The first issue to be discussed in this decision is whether the beneficiary has the requisite experience as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (ii) *Other documentation* -- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
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> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750), filed with the Department of Labor on November 27, 1995, indicates that the minimum requirement to perform the job duties of the proffered position of live-in housekeeper is three months of experience in the job offered.

Counsel submitted letters of experience from the beneficiary's former employers that established that the beneficiary worked part-time as a caregiver from March 1997 to the present.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite training of three months and denied the petition accordingly. The director noted that although the beneficiary's work experience in aggregate equaled the minimum requirement, the beneficiary had not met the requirement as of the priority date of the petition.

On appeal, counsel submits a letter from [redacted] that verifies the beneficiary's experience as a live-in housekeeper from October of 1994 to March of 1995. This letter demonstrates that the beneficiary has over three months of experience with the skills required by the petitioner's alien labor certification application preceding the priority date. Therefore, the petitioner has overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is November 27, 1995. The beneficiary's salary as stated on the labor certification is $1,399 per month or $16,788 per annum.

Counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1040 for the years from 1995 through 2001. Forms 1040 reflected adjusted gross incomes of $55,954; $74,335; $57,401; $57,887; $80,344; $87,369; and $74,666, respectively.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because the director considered it implausible that the petitioner could care for a family of four and pay the proffered wage, and denied the petition accordingly.

On appeal, counsel asserts that the petitioner's tax returns show the ability to pay the wage offered and provides a document signed by the petitioner that details the petitioner's monthly expenses. That document indicates that the petitioner spends approximately $2,240 per month on living expense or $26,880 annually.[1]

The petitioner's Form 1040 for calendar year 1995 shows an adjusted gross income of $55,954. Reducing $55,954 by the petitioner's annual expenses of $26,880 leaves $29,074 in remaining income. The petitioner could pay a proffered wage of $17,788.00 a year out of this remaining income.

The petitioner's Form 1040 for calendar year 1996 shows an adjusted gross income of $74,335. Reducing $74,335 by the petitioner's annual expenses of $26,880 leaves $47,455 in remaining income. The petitioner could pay a proffered wage of $17,788.00 a year out of this remaining income.

The petitioner's Form 1040 for calendar year 1997 shows an adjusted gross income of $57,401. Reducing $57,401 by the petitioner's annual expenses of $26,880 leaves $30,521 in remaining income. The petitioner could pay a proffered wage of $17,788.00 a year out of this remaining income.

The petitioner's Form 1040 for calendar year 1998 shows an adjusted gross income of $57,887. Reducing $57,887 by the petitioner's annual expenses of $26,880 leaves $31,007 in remaining income. The petitioner could pay a proffered wage of $17,788.00 a year out of this remaining income.

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[1] The director should have requested evidence concerning the individual petitioner's expenses since the reasoning behind the decision to deny the petition was based upon this issue.

The petitioner's Form 1040 for calendar year 1999 shows an adjusted gross income of $80,344. Reducing $80,344 by the petitioner's annual expenses of $26,880 leaves $53,464 in remaining income. The petitioner could pay a proffered wage of $17,788.00 a year out of this remaining income.

The petitioner's Form 1040 for calendar year 2000 shows an adjusted gross income of $87,369. Reducing $87,369 by the petitioner's annual expenses of $26,880 leaves $60,489 in remaining income. The petitioner could pay a proffered wage of $17,788.00 a year out of this remaining income.

The petitioner's Form 1040 for calendar year 2001 shows an adjusted gross income of $74,666. Reducing $74,666 by the petitioner's annual expenses of $26,880 leaves $47,786 in remaining income. The petitioner could pay a proffered wage of $17,788.00 a year out of this remaining income.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of filing of the petition and continuing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.